Supreme Court, U.S.
FILED
OCT 3 2003
OFFICE OF THE CLERK

NO. 03-188

IN THE

Supreme Court of the United States

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; AND WESLEY S. SEMPLE, ON BEHALF OF THEMSELVES AND ALL OTHER NON-MEMBERS SIMILARLY SITUATED,

Petitioners,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA; NATIONAL EDUCATION ASSOCIATION; AND SHALER AREA EDUCATION ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER LOCAL ASSOCIATIONS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

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October 3, 2003

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I. The Unions Admit That There Is a Conflict Among the Lower Courts on the First Two Questions Presented.

Respondent unions ("Unions") admit that there is a conflict among the Third Circuit, other United States Courts of Appeals, and highest state courts on the first two questions the Petition presents. However, the Unions bizarrely argue that a split among the courts does not count if there is no split among "the more recent decisions." Brief in Opposition ("Opp'n") at 11. Incredibly, the Unions claim that Supreme Court Rule 10(a) is nullified because the cases supporting them and the Third Circuit were decided a few years after the conflicting cases! Does a widespread split of opinion among the lower courts disappear if the more recent cases happen to agree? Of course not, and nothing in this Court's rules or case law supports such an illogical assertion.

The Unions maintain that the more recent decisions are "well reasoned," while the contrary earlier decisions are "cursory" and "tentative." Opp'n at 11. In fact, the opposite is true.

The "analysis" in *Reese v. City of Columbus*, 71 F.3d 619, 623-24 (6th Cir. 1995), is only two paragraphs. It erroneously found that a majority of this Court approved the chargeability of pooled litigation expenses in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). It also totally ignored this Court's holding in *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984), that extra-unit litigation expenses "are not to be charged to objecting employees." *See* Petition ("Pet.") at 10 n.7, 15, 22 n.23.

The Seventh Circuit provided no analysis at all in *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998). Instead, it cryptically said that litigation expenditures are "analytically identical, as far as we can see," to all other extra-unit expenditures. Then, while totally ignoring *Ellis*, it merely deferred to the National

Labor Relations Board ("NLRB"). *Id.* at 1016. The NLRB's decision only had two paragraphs of "analysis." More important, the NLRB recognized that this Court in *Ellis* and *Lehnert*, 500 U.S. at 528, held all extra-unit litigation **not** chargeable. The NLRB, however, declined to follow those rulings because it felt they were not binding under the NLRA. *California Saw & Knife Works*, 320 N.L.R.B. 224, 238 (1995), *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998); *see* Pet. at 14-15 & n.15. Both the Third and Seventh Circuits, Pet. App. A at 23a, *Machinists*, 133 F.3d at 1016, inexplicably omitted from their "analysis" the NLRB's recognition of this Court's extra-unit litigation holdings.

In contrast, the slightly earlier, conflicting decisions fully analyzed and discussed both *Ellis* and *Lehnert*. The Tenth Circuit's analysis of this issue in *Pilots Against Illegal Dues (PAID) v. Air Line Pilots Ass'n* consists of more than two pages. 938 F.2d 1123,1129-31 (10th Cir. 1991). Far from being "a glanc-ing nod," Opp'n at 13, *PAID*'s discussion of *Lehnert*'s extra-unit litigation ruling consists of more than half a page and a footnote. 938 F.2d at 1130 & n.4. Moreover, the Tenth Circuit analyzed more than just "Justice Blackmun's plurality opinion," Opp'n at 13. It discussed *Lehnert*'s general three-prong chargeability test, *Lehnert*, 500 U.S. at 519, and confronted *Lehnert*'s teaching regarding expense pooling, *id.* at 524, in holding extra-unit litigation nonchargeable. *See PAID*, 938 F.2d at 1128-30; Pet. at 10 & n.8, 12 & n.11.

The Unions belittle the two state court decisions which reached the same conclusion as "proceeding on little more than the assertion, unsupported by further reasoning or explanation, that Justice Blackmun's plurality opinion in *Lehnert* was 'persuasive.'" Opp'n at 14. The two courts, however, relied on more than Justice Blackmun's words to find his opinion persuasive.

Albro v. Indianapolis Education Ass'n analyzed this issue for three paragraphs and based its holding on Justice Scalia's concurring and dissenting opinion and the Court's judgment in *Lehnert*. 585 N.E.2d 666, 673 (Ind. Ct. App.), *adopted sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992). The Wisconsin Supreme Court spent three paragraphs on the issue, applied the general chargeability test, and discussed the Blackmun and Scalia opinions: "[I]t may be inferred from Justice Scalia's discussion of *Ellis* and from other early cases that a majority of the Court would find extra-unit litigation expenses non-chargeable." *Browne v. Wisconsin Emp. Rel. Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992). *See* Pet. at 15, 20 n.21.

There is nothing "tentative" about these three well-reasoned decisions that are faithful to this Court. The Unions' claim that the more recent decisions "represent an emerging consensus that * * * fully overrides the [earlier] tentative view," Opp'n at 11, is merely their biased view that analysis in cases they favor is more substantive than analysis in cases they dislike. The fact remains that a significant split exists on this issue among the courts. More than seven different courts have discussed and tried to resolve this issue for almost twelve years and have split almost evenly. *See* Pet. at 11-16, 22 & n.23. Further "percolation" will provide no further assistance to this Court. It should exercise its supervisory power to now resolve this conflict.

II. *Lehnert* Established Exceptions to Its General Ruling on Pooled Affiliate Expenditures.

The Unions also argue against granting the Petition because the "Third Circuit correctly resolved the litigation issue on the basis of *Lehnert*'s basic principles" and its general ruling on "pooled expenditures." Opp'n at 7. However, the three questions presented by the Petition involve the two exceptions to *Lehnert*'s general rule that otherwise chargeable expenses of

parent affiliates incurred in other bargaining units may be pooled or charged to objecting nonmembers. *See* Pet. at i, 8-9. The Unions ignore this and the fact that in *Lehnert* Justice Blackmun's plurality opinion specifically rejected their contention that the pooled expenditures "rationale supports treating as chargeable pooled litigation expenditures that are germane to collective bargaining, just as other pooled union expenditures that are germane * * * are treated as chargeable," Opp'n at 7.

Justice Blackmun clearly stated in *Lehnert*:

> This rationale [that unions may bill dissenting employees for their share of general collective-bargaining costs of the state or national parent union] **does not extend**, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit * * * . While respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit, we find extraunit litigation to be more akin to lobbying in both kind and effect. We have long recognized the important political and expressive nature of litigation. Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative.

500 U.S. at 527-28 (emphasis added; citations omitted).

III. Extra-Unit Litigation Has a Greater Impact on First Amendment Rights Than Extra-Unit Bargaining Does.

Contrary to the Unions, Opp'n at 10 n.6, and the Third Circuit, even extra-unit litigation "germane to collective bargaining" does not pass *Lehnert*'s three-prong chargeability test. As

just discussed, Justice Blackmun found that this type of extra-unit litigation did not meet the first prong–"'germane' to collective-bargaining activity," 500 U.S. at 519. *Id.* at 527-28. Moreover, neither can extra-unit litigation pass the third prong–that it "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop," *id.* at 519. Extra-unit litigation, like organizing, *see Ellis*, 466 U.S. at 452-53, may not be charged to objectors because both are similar to political activities that have too attenuated a connection to bargaining, and both further burden free speech beyond the burden imposed by the agency shop itself.

The Unions and the Third Circuit are wrong that requiring an objecting feepayer to subsidize extra-unit litigation "has no greater impact on the feepayer's First Amendment rights" than requiring her to pay her share of pooled costs of extra-unit negotiations, Opp'n at 8. The Unions ignore Justice Blackmun's cogent point that "extraunit litigation [is] more akin to lobbying in both kind and effect," because of "the important political **and expressive** nature of litigation." *Lehnert*, 500 U.S. at 528 (emphasis added).

All litigation is not necessarily political. However, it is all public in nature, involves more than just the employer and union, and is "expressive" in a First Amendment sense, because litigation "is a means of petitioning the government that the first amendment protects." Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. Rev. 872 (1988). Thus, even litigation that involves only economic matters, such as labor contracts, is like lobbying in its relationship to the First Amendment. Where "groups with common interests * * * use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view **respecting resolution of their**

business and economic interests," their "right of access to the agencies and courts * * * is part of the right of petition protected by the First Amendment." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 513 (1972) (emphasis added); *see United Transp. Union v. State Bar*, 401 U.S. 576, 585 (1971). That cannot be said of collective bargaining itself, because there is no First Amendment right to bargain collectively. *See Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979) (per curiam).

While coerced support of other extra-unit bargaining-related activities may not add substantially to the burden on First Amendment rights the agency shop imposes, coerced support of extra-unit litigation does: "compelled subsidization of union litigation directly infringes objectors' corresponding first amendment right to refrain from litigation. The need to tailor this infringement narrowly mandates that the range of litigation expenditures chargeable to objectors be limited to those directly involving bargaining unit employees." Malin, *supra*, at 872.

IV. The Extra-Unit Litigation in *Ellis* Included Bargaining Related Litigation.

The Unions and the Third Circuit also are wrong that this Court's *Ellis* opinion does not address whether a local bargaining agent can choose to fund litigation that is "a normal incident of the duties of the exclusive representative," *Ellis*, 466 U.S. at 453, through a cost sharing arrangement with an affiliate. Opp'n at 10-11.[1] The litigation at issue, **which was held**

[1] The Unions also rely on Justice Kennedy's separate opinion in *Lehnert*, 500 U.S. at 562-64. *See* Opp'n at 9-11, 13. Justice Kennedy apparently disagreed with Justice Blackmun's ruling that all extra-unit litigation is nonchargeable. That Justice Kennedy felt compelled to note his position on this issue, although he also joined in Justice

(continued...)

nonchargeable in *Ellis*, included litigation related to collective bargaining in other units.

The "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings," which was held nonchargeable in *Ellis*, 466 U.S. at 453, was "intervention in an employer's bankruptcy proceedings [that] protected the union members' wages and **ensured continued compliance with the collective bargaining agreement** while the employer underwent reorganization." *Ellis v. Railway Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982) (emphasis added), *rev'd in pertinent part*, 466 U.S. 435 (1984). "[D]efending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964" undoubtedly is "a normal incident of the duties of the exclusive representative." Nevertheless, it, too, was held nonchargeable by *Ellis*, unless the non-members' "bargaining unit is directly concerned." 466 U.S. at 453. In *Lehnert*, Justice Blackmun recognized that *Ellis* so held by specifically mentioning "union litigation" involving "bankruptcy proceedings" and "employment discrimination," citing *Ellis*, when he ruled that the general principle permitting pooling of otherwise chargeable parent union expenditures does not apply to extra-unit litigation. 500 U.S. at 528.

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[1] (...continued)
Scalia's opinion, 500 U.S. at 550, strongly suggests that Justice Scalia agreed with Justice Blackmun on this issue. *See* Pet. at 17-21. Significantly, the Unions failed to respond to this point, except to note that Justice Scalia joined in *Lehnert*'s "teaching with respect to expense pooling generally," Opp'n at 13 & n.9. As the Teachers demonstrated, Pet. at 9-17, there is widespread confusion among the lower courts over Justice Scalia's–**and, thus the Court's**–position on the chargeability of extra-unit litigation. This alone is reason to grant certiorari on the first two questions presented by the Petition.

In short, the Unions' attempts to distinguish *Ellis*, Opp'n at 8-11, are unavailing, because *Ellis* unanimously held all extra-unit litigation nonchargeable. **Both** Justices Blackmun and Scalia recognized that the *Ellis* holding on extra-unit litigation has a constitutional basis. *Lehnert*, 500 U.S. at 528 (Blackmun, J.); *id.* at 555 (Scalia, J.). Consequently, that holding is controlling here and should have been followed by the Third Circuit.

The Unions' "practical" argument that they cannot "undertake a unit-by-unit allocation of their litigation expenditures," Opp'n at 9 n.5, is disingenuous. All of their litigation expenses are easily identifiable and allocable by the local union or employer involved in each case. *See* R. 103, Exs. H-O (Stipulation of Facts). Moreover, that the impact of an activity on First Amendment freedoms must be considered in determining chargeability implies a need for greater sensitivity than that shown by the Unions and the Third Circuit in deciding what is germane to collective bargaining. In "close situations, the accounting should favor the dissenter's right ***not*** to fund programs they find offensive." *Schneider v. Colegio de Abogados*, 917 F.2d 620, 637 (1st Cir. 1990).

V. Reply to Arguments in Opposition to Third Question Presented about Health-Care Representation Costs.

As in their response to the first two questions, the Unions ignore the applicable exception to *Lehnert*'s general rule in responding to the third question. Instead, they argue the general rule as though no exception exists. *See* Opp'n at 14-17.

However, in *Lehnert*, a clear majority of the Court held that the general rule "does not serve to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit," and that, "as always, the union bears the burden of proving" "some indication

that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." 500 U.S. at 524; *see id.* at 534 (Marshall, J., joining in Part III-B of the principal opinion). Thus, this exception cannot be ignored here.

The Unions, by quoting from the Reply Brief for the Petitioners in *Lehnert*, also attempt to suggest that the precise issue of whether objecting educational professionals can be charged for the cost of representing public- and private-sector health-care nurses presented here was raised and resolved in *Lehnert*. Opp'n at 15-16. The *Lehnert* Reply Brief presented the issue of whether the *Lehnert* higher education faculty petitioners had to pay for the NEA and state affiliate costs of representing K-12 teachers, school secretaries and **school** nurses. *Id.* at 16. The Court answered affirmatively, but in so doing added the exception and burden of proof requirement noted above.

The Teachers here do not challenge paying for their share of the pooled costs of representing school nurses, school secretaries and other education support personnel, *see* Pet. App. C at 59a (¶ 15), 64a. Those employees, like the teachers, are all in the same industry, covered by the same bargaining statutes, and employed by the same type of employer. That is not the case with nurses employed by private- and public-sector hospitals and other health-care employers **outside public education**. Only the costs of representing the latter employees are challenged here as being for "unrelated bargaining unit[s]," 500 U.S. at 524.

The Unions argue that the Third Circuit's decision is in accord with *Finerty v. NLRB*, 113 F.3d 1288 (D.C. Cir. 1997). Opp'n at 16. *Finerty* is easily distinguishable. First, the court there based its decision on the fact that the parent union, not the local union, as here, was "*the designated bargaining agent for all*

of the affected employees in its approximately 2,400 different bargaining units * * * ." *Id.* at 1291 (emphasis in original). Second, *Finerty* did not involve the First Amendment and, thus, review *de novo*, as here. Rather, *Finerty* merely involved the statutory duty of fair representation and the deference a court owes an administrative body. *Id.* Third, *Finerty* involved only whether the union's "method of allocation is * * * *per se* unlawful," not, as here, "challenges to *specific* representational expenses." *Id.* at 1292 (emphasis in original).

Finally, and most important, *Finerty* recognized that in a "subsequent challenge proceeding" the NLRB might find that "some of the pooled charges may be collected [lawfully] only from employees in certain designated bargaining units," because those expenses would not inure to the benefit of employees in another industry ("*e.g.*, money for strike funds that would be available to support employees in the private sector, but unavailable to employees in public-sector units where strikes are unlawful"). *Id.* That is precisely the issue here, and one on which the Unions failed to meet their burden of proof under *Lehnert*. *See* Pet. at 26.

CONCLUSION

The petition should be granted as to all questions presented.

Respectfully submitted,

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October 3, 2003